BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHEILA R. PORTER	)	
Claimant	)	
	)	
VS.	)	
	)	
MAC'S RESTAURANT	)	
Respondent	)	Docket No. 1,031,893
	)	
AND	)	
	)	
KS RESTAURANT & HOSPITALITY ASSOC .	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the January 12, 2007 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) granted the claimant benefits, implicitly finding she sustained an accidental injury arising out of and in the course of her employment on September 30, 2006. Respondent appeals asserting the ALJ's "finding of an injury occurring on September 30, 2006 is not supported by credible evidence and should be overturned."[1] Respondent argues, in the alternative, that "if [c]laimant's back was reinjured on September 30, 2006 because her previous back condition following a work injury at Ray's IGA had not yet healed, that employer and not the [r]espondent, is the party that in theory is legally responsible for the continuing treatment of Ms. Porter's lumbar spine despite any reinjury occurring on September 30, 2006."[2]

Claimant argues that the ALJ should be affirmed in all respects.

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[1] Respondent's Brief at 2 (filed Feb. 15, 2007).

[2] *Id.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this member of the Board finds the ALJ's preliminary hearing Order should be affirmed.

There is no serious dispute that the claimant sustained an accidental fall on September 30, 2006 while working for respondent. The sole issue between the parties stems from the nature of claimant's complaints and whether they are due to an earlier injury (while working for another employer) or if her present complaints represent a new injury.

Claimant sustained some sort of injury while working for another employer, Ray's IGA, well before September 30, 2006. As a result of that injury, claimant had low back complaints and required conservative treatment and pain medications, including Oxycodone. Her recent need for this pain medication was, according to her, sporadic, depending on her activities.

Claimant then went to work for respondent as a waitress and later as a cook. While there, she sustained a slip-and-fall injury that was witnessed by coworkers. She left work early that day because of the pain. According to claimant, her boss, Don McManaman, was angry that she left early.[3] Claimant also testified that she believed she would be fired if she asserted a work-related claim.[4] Mr. McManaman denies that he told claimant he would fire her for making a claim and makes no mention of being angry that claimant left work early that day.

Claimant's low back and leg pain did not subside, and on October 3, 2006, she sought treatment from her own physician, Dr. Kelley, who treated her for her earlier low back injury. Claimant indicated that she did not disclose the fact of the work-related fall as she was concerned her employer would be notified of the workers compensation claim. Claimant testified she was hoping the pain would go away and she could get on with her life.[5]

After her fall, respondent reassigned claimant to the kitchen to cook rather than as a waitress. This was harder work (and less lucrative) and claimant testified that she was unable to continue. On October 22, 2006, claimant voluntarily left her employment with respondent and commenced working elsewhere as a cook.

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[3] P.H. Trans. at 16.

[4] *Id.* at 14-15.

[5] *Id.* at 18.

Both Dr. Kelley and Dr. Delgado, have opined that claimant sustained a work-related injury on September 30, 2006, although, as respondent points out, this is based solely on claimant's recitation of the events. Nonetheless, there is no dispute that claimant fell on September 30, 2006. The true issue is whether she sustained any additional injury or an aggravation of her preexisting condition.

The ALJ reviewed the evidence and concluded as follows:

> While the Court's review of Dr. Kelley's medical records fail to disclose any change in the medication regimen or frequency of visits, the visit on October 3rd does document new lower extremity complaints. This, coupled with the medical opinions of Dr. Kelley and Dr. Delgado, convinces the Court that she has just barely met the burden of proof.
>
> While it might be argued that the [c]laimant's condition is only the natural and probable progression of earlier injuries, or the [sic] *Logsdon* applies, the [r]espondent has offered no medical opinions to support this speculation.[6]

This Board Member has reviewed the record and considered the parties' arguments and agrees with the ALJ. Claimant fell on September 30, 2006 while in respondent's employ. Even Mr. McManaman concedes this fact. He also concedes that he knew she left early that day. While it is unfortunate that the medical records do not reflect claimant's reference to a work-related fall, she has explained why she did not make such a disclosure. And those same medical records reveal additional leg complaints, not just the low back complaints claimant had experienced before September 30, 2006. Thus, while claimant may well have some preexisting permanent impairment, she is nonetheless entitled to the benefits she seeks as even an aggravation of a preexisting condition is considered compensable.[7]

And like the ALJ, this Board Member is unpersuaded that the principles set forth in *Logsdon*[8] apply to the instant action. There is simply no evidence in this file to substantiate respondent's contention that "it is clear the [c]laimant's prior back injuries, including the injuries to her lumbar spine following he work injury at Ray's IGA, had not healed."[9] In fact, the medical records indicate precisely the opposite. Thus, at least insofar as this record is developed, *Logsdon* does not apply.

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[6] ALJ Order (Jan. 12, 2007) at 1.

[7] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[8] *Logsdon v. Boeing Co.*, 35 Kan. App.2d 79, 128 P.3d 430 (2006).

[9] Respondent's Brief at 6.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[10] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated January 12, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2007.

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Larry G. Karns, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

[10] K.S.A. 44-534a.